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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 526

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY, ET AL.,

Respondents.

No.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY, ET AL.,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT,
AND BRIEF IN SUPPORT THEREOF.

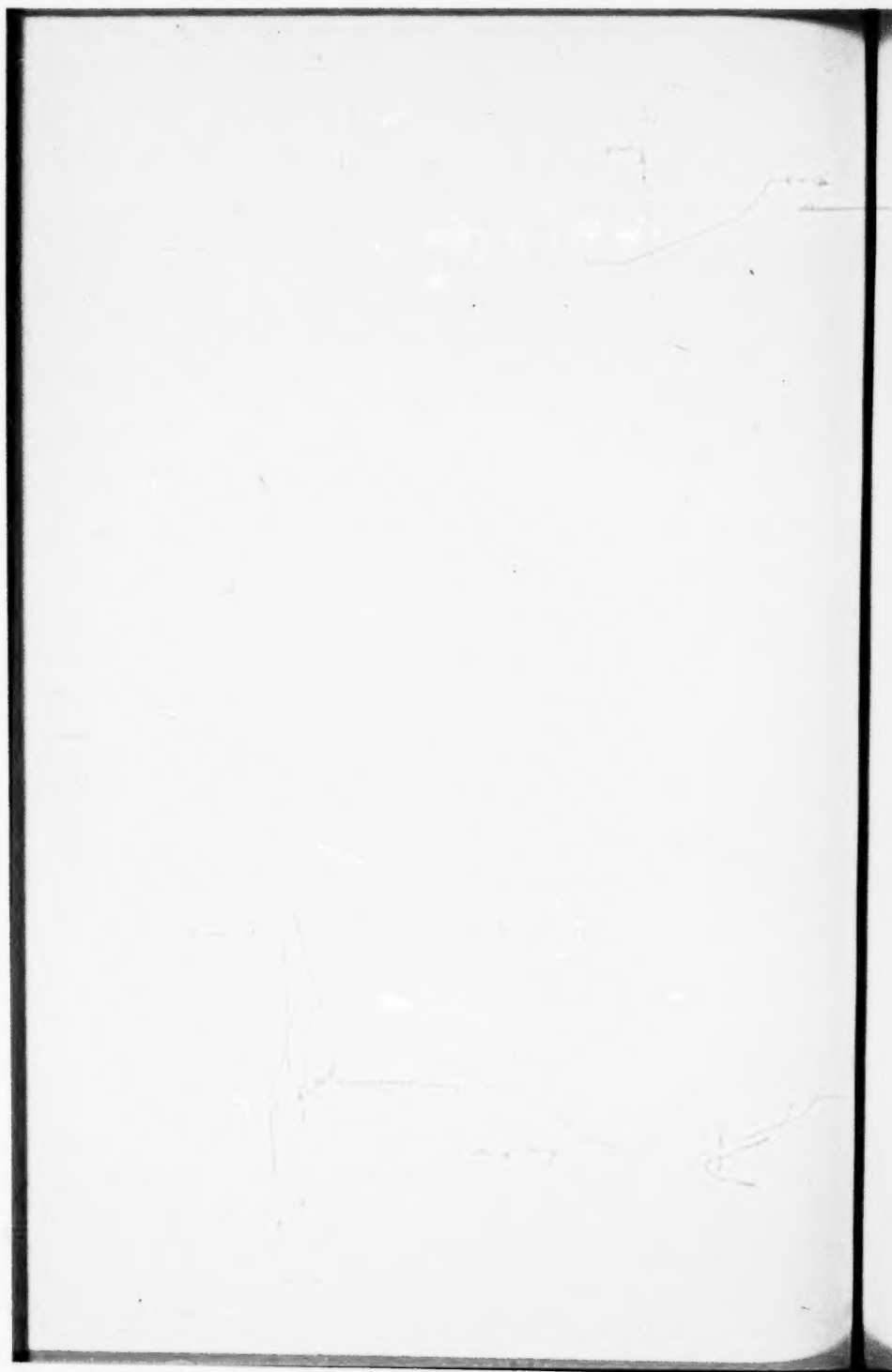
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**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

*To the Honorable the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Your Petitioners, Chicago, Milwaukee, St. Paul and Pa-
cific Railroad Company, and Associated Parties consisting

of its trustees in bankruptcy and the trustees under its mortgages*, respectfully pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Eighth Circuit, holding that Petitioners were not entitled to share in a joint condemnation award and judgment entered thereon in certain proceedings where the Government condemned a perpetual flowage easement against 26.7 miles of railroad owned by The Chicago, Rock Island and Pacific Railway Company, and in which Petitioners had valuable operating and property right under the terms of a 99-year indenture.

* The Associated Parties referred to are the following:

Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, United States Trust Company of New York, Corporate Trustee of General Mortgage of Chicago, Milwaukee & St. Paul Railway Company dated May 1, 1889, Guaranty Trust Company of New York, Corporate Trustee, and Merrell P. Callaway, Individual Trustee, of Mortgage and Deed of Trust dated as of February 2, 1925, of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The National City Bank of New York, Corporate Trustee, and William W. Hoffman, Individual Trustee, of Adjustment Mortgage dated as of February 2, 1925, of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Chemical Bank & Trust Company, Successor Corporate Trustee, and Howard B. Smith, Successor Individual Trustee of First and Refunding Mortgage dated as of February 2, 1925, of Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In connection with improvement of navigation on the Mississippi River, the United States Government constructed Lock and Dam No. 16, about $1\frac{3}{4}$ miles north of the City of Muscatine, Iowa. This dam created a pool upstream, and, because of the increased water level in the pool, the Government condemned a perpetual flowage easement against a double track railroad 26.7 miles long, lying on the west bank of the river between Davenport and Muscatine, Iowa. This double track line of railroad was owned by The Chicago, Rock Island and Pacific Railway Company (hereinafter called "Rock Island"), and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter called "St. Paul") had valuable operating and property rights therein under the terms of a 99-year indenture, entered into on August 1, 1901 (R. 86-106).

This indenture was much more than a mere trackage agreement. Under this indenture, the Rock Island granted to the St. Paul the full, joint and equal use of said railroad, in common with the Rock Island, the indenture reciting the grant as "meaning and intending to include in the description aforesaid all and each portion of said railway and appurtenant property between and at the points aforesaid, and all such improvements and betterments thereof and additions thereto, as shall be jointly used by the parties" (R. 87). The St. Paul was given the right to do all business of a common carrier, with certain minor exceptions (R. 88); the right to construct, maintain and operate its own telegraph and telephone lines on poles of the Rock Island, with instruments in all stations (R. 88-89); and the

right to construct additional facilities on the Railroad, if the Rock Island did not construct them on demand, with the right to retain title thereto, subject to an option of the Rock Island to purchase (R. 94). The Rock Island maintains and repairs the property (R. 89), and trains are operated under its orders (R. 93). Except for engine men and trainmen, all employes engaged in maintaining, repairing and operating the line are joint employes (R. 98, 99). The St. Paul can terminate the indenture on five years' written notice (R. 103), but the Rock Island has no right of termination, in the absence of default (R. 102). The Rock Island and St. Paul are the only companies in possession of and using the property (R. 48).

On the strength of this indenture, the St. Paul has constructed and owns and operates an extensive terminal yard immediately south of and adjoining the Rock Island property at Nahant station, near the north end of the line (R. 107). It has constructed, on the Rock Island right of way, approximately two miles of railroad tracks, which are owned, operated and maintained exclusively by the St. Paul (R. 36, par. 4; R. 37, 38, 40; R. 44, 45, par. 10). It has also constructed on Rock Island property a yard office building and coal house (R. 39, 40); two telegraph wires and two telephone wires (R. 45); the batteries, selectors and equipment to operate them (R. 42); an interlocking plant (R. 36); and has participated in the construction of a tower building, station building and ice house (R. 36, 37, 41, 43).

For the rights, interests and privileges granted, the St. Paul was required to pay two per cent interest on the agreed valuation of the road, and two per cent interest on the cost of all additions and permanent betterments, one-half the taxes, and a wheelage proportion of the cost of all repairs and maintenance and of the salaries of all employes on the railroad, except engine and trainmen (R. 89-92). It

was stipulated that the St. Paul's wheelage proportion was 46.346 per cent (R. 48).

On September 7, 1940, the Secretary of War filed in the United States District Court, for the Southern District of Iowa, a petition to condemn a perpetual flowage easement along the 26.7 miles of railroad aforesaid, including all right of way, embankment, tracks, bridges and other structures (R. 1-4). Both the Rock Island and St. Paul, and their respective Trustees in bankruptcy and the Trustees under their respective mortgages, were named as parties defendant (R. 1). The petition asked to condemn the flowage easement sought as against all rights, interests and ownership in the property, and that just compensation be awarded to all parties entitled thereto (R. 2, 3).

Hearings were had before condemnation commissioners, and the Government engineer, the Rock Island engineer and the St. Paul engineer all testified and agreed in fixing the total damages to all property interests involved at \$127,539.00 (R. 30). No part of the railroad property was taken, but the condemnation damaged the railroad embankment, tracks, culverts and bridges, because the flowage easement raised the water levels of the river to a higher elevation than obtained in a state of nature and made the railroad more susceptible to washouts and flood damage. The physical property damaged by the water was in an area 23,500 feet immediately upstream from Lock and Dam No. 16 (R. 28), in which area the St. Paul had no independently owned structures except telephone and telegraph wires (R. 64, 65). The award embraced the agreed actual cost of the repairs, such as riprapping, earth construction, grading, grade raises and alterations, and changes in bridges and culverts, which would be required to place the railroad in as good, safe and efficient condition as it was before the condemnation (R. 31, 54, 68, and Exhibit "A" offered at R. 33, shown R. 121-130). The Rock Island

avoided spending \$92,518.00 of the award for repairs, by making a line change in a part of the area affected at a cost of \$151,020.73 (R. 32, 52, 57). This procedure increased the St. Paul's damages over what they would have been, had the entire amount of the award been spent for repairs, as contemplated, because it imposed upon the St. Paul an obligation to pay annually 2 per cent interest on the added investment, plus a wheelage proportion of the service loss and of the repairs not avoided by the line change (R. 59, 60, 120).

The District Court confirmed the award and the amount thereof was paid into the registry of the Court (R. 10-12).

The Rock Island filed a petition in the District Court, asking payment of the entire award to it as fee owner of the railroad line in question (R. 25-28).

The St. Paul filed a petition in the District Court, asking that it be awarded \$59,104.00, or 46.346 per cent of the sum deposited, on the theory that the entire award was exclusively for repairs and had been agreed upon as the actual cost of the repairs necessary to place the railroad in as good, safe and efficient operating condition as it was before the condemnation (R. 30, 31, 50, 51, 54, 68, 69), and that the St. Paul had an easement and possessory estate in this railroad, based upon the indenture of August 1, 1901, under which it would be required to pay to the Rock Island 46.346 per cent of the cost of such repairs. It also prayed for relief, in the alternative, on the basis of the line change above referred to.

The District Court held that the St. Paul had a valuable easement in the railroad and that the condemnation was a substantial interference therewith, but that the St. Paul's property was taken only theoretically and not actually, and its damages were not proximate, but consequential, and not recoverable (R. 212-223). It ordered payment of the entire

award, except \$100.00, nominal damages, to the Rock Island (R. 227).

On appeal by both railroads to the Circuit Court of Appeals for the Eighth Circuit, that Court held that the St. Paul had no easement or property interest of any kind in the railroad, entitling it to be heard in the condemnation suit, or sufficient to justify any participation by it in the award; that the evidence failed to show that the St. Paul sustained any actual damages as a result of the condemnation proceeding, and that its damages were consequential and not the proximate result of the condemnation of the flowage easement by the Government (R. 270-278). It ordered the entire award paid to the Rock Island (R. 270).